telecommunications facilities."[50] The Commission, therefore, should reject claims that additional regulations or safeguards are needed.

Seeking to bolster their arguments for a new cost allocation proceeding, the cable interests claim that LECs need "direction" and "guidance" on the application of Part 64 to OVS.[51] Those comments reflect a fundamental misunderstanding of the Part 64 rules. Those rules fully accommodate the joint provision of common carrier and non-common carrier services.[52] Moreover, they include detailed requirements for the filing of cost allocation manuals and changes to those manuals.[53] Consequently, there is no need to delay OVS by conducting a cost allocation proceeding first.

A number of cable interests also argue that price caps and Part 64 are inadequate to protect against cross-subsidization.[54] Those claims are a familiar litany, which the Commission heard and rejected many times in the context of VDT. Such claims should not be given new life with OVS, which is supposed to involve lesser regulatory burdens, not greater ones.

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[50] *Cross-ownership Order,* ¶ 161. The Commission also noted that, "[i]n the future, LEC incentives and ability to shift costs and cross-subsidize may be reduced even further by the introduction of competition in the provision of local exchange telephone service." Id., ¶166, n. 311. With the 1996 Act, that day has arrived. As a result, it is nonsensical to argue that LECs -- who now face competition from companies such as AT&T and MCI, in addition to cable companies -- would seek to raise rates for their local exchange services, or undertake unprofitable video investments simply to disadvantage a potential cable entrant into telephony. See Time Warner at 9.

[51] NCTA at 22.

[52] Joint Parties at 31. Indeed, Part 64 actually overallocates costs to competitive services. The correct economic standard for determining cross-subsidy is incremental cost, as the Commission itself has recognized.

[53] 47 C.F.R. §64.901. Contrary to the claims of TCI, CAMs are extremely detailed in the description of cost allocation procedures, including a description of each and every cost pool (of which there may be hundreds) and the respective allocation technique.

[54] NCTA, p. 22-23 and Johnson Declaration.

Finally, a number of cable commenters argue that the Commission should go beyond Part 64 and require, in addition, that separate subsidiaries be required for OVS systems and affiliated video programming providers.[55] These arguments fly in the face of the 1996 Act and would clearly undermine Congress' goal of "flexible market entry, enhanced competition, streamlined regulation, diversity of programming choices, investment in infrastructure and technology, and increased consumer choice."[56]

First, such a requirement adds nothing in the way of benefits to the Commission's existing regulatory safeguards, but would impose significant costs that ultimately would be borne by consumers. In effect, it would mean that the left side of telephone company wires would be owned by one company, while the right side would be owned by a different one. Since the cable interests argue that structural separation means the two companies could not have any common employees, this would require complete duplication of all functions now performed by a single company ranging from network operations and maintenance to marketing. The result would be artificial inflation of both OVS and local telephony costs. While this would benefit the cable interests, it would obviously harm consumers.

Moreover, contrary to TCI's argument,[57] the 1996 Act does not require that OVS be provided through a separate subsidiary. Indeed, the Act makes

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[55] E.g., American Cable at 20; Time Warner at 10; TCI at 15.

[56] Notice, ¶ 4, *quoting* the Conference Report at 172, 177-78.

[57] TCI at 16.

clear that Congress did *not* intend for the Commission to impose such a requirement. The 1996 Act permits BOCs to provide "incidental" interLATA services upon enactment.[58] Incidental interLATA services are defined to include "the interLATA provision by a Bell operating company" of "video programming, or other programming services to subscribers", "the capability for interaction by such subscribers to select or respond to such . . . programming", and the provision of services to distributors of programming that the BOC is permitted to distribute.[59] Section 272 of the Act specifically excepts from the requirement for a separate affiliate "incidental interLATA services described in paragraphs (1) [and others] of Section 271(g)."[60] Given this explicit statutory statement, and Congress' clear direction that the Commission not impose Title II or Title II-like regulation on OVS,[61] the Commission should reject arguments for the imposition of a separate subsidiary requirement.

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[58] 1996 Act §271(b)(3).

[59] 1996 Act §271(g)(1). TCI's arguments based on §271(h) misread the statute. TCI omits from its quotation of §271(g) the words "to subscribers" and consequently argues that provision of video programming to the public is not included in "incidental" interLATA services. In fact, §271(h) is intended to prevent a BOC from claiming that, e.g., the provision of interLATA long distance service to NBC is "incidental" to the distribution of NBC's video programming to subscribers, not to eliminate a BOC's ability to provide video programming to subscribers if it involves interLATA service.

[60] TCI,s argument that the provision of video service is an information service required to be provided through a separate subsidiary under §272(a)(2)(C) is nonsensical and would render the language of Section 271(g) meaningless. TCI at 16-17.

[61] MCI's argument, p. 8, that the Commission is required to impose Title II regulation on OVS is a blatant misstatement of the Act. Section 653(c)(3) explicitly provides that "[w]ith respect to the establishment and operation of an open video system, the requirements of this section shall apply *in lieu of, and not in addition to*, the requirements of title II" (emphasis added). Similarly, MCI's argument, p. 7, that the Commission should reinstate video dial tone requirements such as RAO 25 directly contradicts the 1996 Act, which explicitly terminated the Commission's video dial tone regulations. §302(b)(3).

Finally, NARUC argues that the Commission should immediately initiate a Joint Board to review separations issues raised by OVS.[62] There is no need to do so. Because OVS, unlike VDT, is not a common carrier service, its costs do not flow through the Part 36 process.

C. Designated Title VI Obligations Should Apply Generally In The Same Manner As They Apply To Cable Overbuilders, But Without Replicating Local Franchise Regulation.

The 1996 Act requires OVS operators to comply, to the extent possible, with the must-carry and retransmission consent and PEG rules in a manner that is "no greater or no lesser" than those applied to existing cable systems.[63] It is clear that the qualifier "to the extent possible" grants the Commission latitude to fashion a flexible regulatory approach that recognizes the differences between OVS and closed cable systems. Most importantly, however, the Commission must determine how to apply those Title VI obligations to OVS operators without effectively reimposing local franchise regulation.

Despite Congress' clear intent to exempt OVS operators from burdensome entry regulation, several parties insist that OVS certification be predicated on a showing of compliance with applicable Title VI regulations.[64] Their position ignores Section 653(a)(1), which provides only for certification of compliance with the Commission's regulations under subsection (b). Title VI requirements are applied to OVS operators in subsection (c). Their position also

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[62] NARUC at 1, 7

[63] 1996 Act §653(c)(2)(A).

[64] NCTA at 38.

ignores the sequence implicit in Section 653(c)(1), which provides that the designated parts of Title VI shall apply "to any operator of an open video system for which the Commission **has approved** a certification under this section" (emphasis added). Moreover, before commencing operations, OVS operators can certify only that they will comply with the Commission's rules.

1. "Must carry" and retransmission consent

To apply the must carry and retransmission consent rules set forth in Section 614 to OVS operators, the Commission need only codify general rules requiring adherence to the provisions of Subpart D of its Rules. Several parties, however, insist on the promulgation of rules that are either redundant to existing regulations or not contemplated under Section 653. For example, broadcasters insist on rules that would ensure that they will retain their existing channel positioning options as they exist on cable systems or that OVS facilities will transmit must-carry signals to those portions of the service area within the relevant television market.[65] OVS operators should be subject to the same provisions of Subpart D of the Commission's Rules as are cable systems; therefore, there is no need to establish any additional rules for OVS.

Other parties contend that the Commission should mandate a "tier buy-through"[66] requirement for OVS, similar to that established under the cable rate regulation rules.[67] The Commission has no authority to impose such a

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[65] ALTV at 4,5; NBC at 5,11; APTS at 20-21; MPAA at 15.

[66] See 47 C.F.R. §76.920.

[67] MPAA at 14.

requirement on OVS. The tier buy-through rules were designed to implement the rate regulation provisions of the 1992 Cable Act, from which OVS is exempt.

2. PEG access

Some parties propose that OVS operators be required to duplicate existing PEG facilities or negotiate with franchising authorities for the provision of PEG access.[68] These proposals ignore the possibility that OVS facilities may offer different capabilities than existing cable systems and may be able to provide equivalent carriage of PEG programming to that provided by cable operators in the OVS service area by means other than the duplication of facilities. For instance, operators that deploy entirely digital OVS will be unable to duplicate analog PEG facilities, but they will be able to provide equivalent carriage of PEG programming. If Congress had intended to impose a rigid duplication requirement, it could have easily done so. Instead, Congress called for obligations that "to the extent possible" are "no greater or lesser than" the Title VI PEG obligations.

Further, OVS operators must not be required to negotiate PEG access with local authorities and incumbent cable operators as a condition for certification. Mandated negotiations would simply reimpose the obligations of Section 621(a)(4)(B), from which Congress clearly intended to exempt OVS operators. Moreover, as already shown, Section 653's certification requirement does not include certification of PEG compliance. If local authorities believe that

[68] National League of Cities at 31 et seq.

an OVS operator has failed to meet its PEG obligations, it can pursue the issue through the dispute resolution process.

OVS operators should be encouraged to employ flexible and workable solutions in achieving the Act's PEG requirements. For example, through the use of narrowcasting, it may be feasible to deliver different PEG programming to different communities in an OVS operator's coverage area. Where it is not economically or technically feasible to employ narrowcasting, however, OVS operators should be allowed to provide other reasonable arrangements such as sharing of PEG capacity among multiple communities. The Commission also should affirm that OVS operators may interconnect with existing PEG feeds to comply with the terms of the 1996 Act. Cable operators and local authorities should not be allowed to prevent or otherwise restrict access to such feeds or condition any interconnection arrangement on compliance with other obligations not expressly imposed by the 1996 Act.

Many communities are now establishing separate non-profit organizations to manage PEG access independent of existing cable operations.[69] These arrangements hold the promise of providing community access to PEG services in a manner that can easily accommodate competing video distribution providers. If the Commission adopts overly-restrictive PEG access rules in this proceeding, they may hinder the use of new and innovative approaches to providing PEG access.

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[69] US West at 18.

D. The Commission Should Not Allow Local Governments To Leverage Their Interests In Public Rights-Of-Way Into A Surrogate Franchise Process.

As argued above, in order for OVS to become a viable competitive service, it is critical that OVS operators not be overburdened by unnecessary government regulation. That is the essence of Congress' explicit direction that OVS operators need not obtain local franchises. Yet, some local government representatives[70] in effect argue that municipalities should be allowed to use their interests in public rights-of-way as a back-door franchise requirement. They argue that LEC OVS operators may not use pre-existing right-of-way authority,[71] should be required by the Commission to obtain additional right-of-way authority *before* filing for certification as an OVS operator,[72] should compensate local governments for the use of rights-of-way through the provision of a payment that exceeds the fee in lieu of franchise fee contemplated by the 1996 Act,[73] and that anything less than such a fee would be an unconstitutional

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[70] See National League of Cities, et al. at 52, et seq. ("League of Cities").

[71] The League of Cities apparently takes the view that notwithstanding the lack of any additional burden to a public right-of-way, municipalities nonetheless have service-by-service approval rights. Thus, the League argues that "OVS falls far outside the scope of any pre-existing authority granted to LECs. Grants made to LECs in the past gave them only the authority to use the rights-of-way to build and operate a local telephone network . . . ." Id. at 67.

[72] The League argues that OVS "certification must include incontestable evidence of specific authorization from each affected local government to use its public rights-of-way for OVS purposes – either in the form of attached licenses or franchises from each local community, or through written certifications by each affected community that such authority has been granted." Id. at 70. Absent such a certification, the League argues, the federal government "would be subject to an immediate takings claim." Id. at 70-71. To impose such a requirement as part of the certification process would exceed the Commission's authority under Section 653, which requires certification only of compliance with subsection (b).

[73] In the League's view, "[t]o the extent that such a fee falls short of what the local government receives from cable operators, it does not represent the fair market value of the local government's property interests". Id. at 65. Their argument is beyond the scope of this proceeding. Congress has spoken on the fee issue and the Commission cannot ignore Congress' determination of what fees are appropriate.

taking.[74] The Joint Parties believe that the League's arguments are based on a misreading of applicable law and would cripple the introduction of OVS as a practical matter. Accordingly, the Commission should reject the League's attempt to use rights-of-way as a means of constructing a local approval process that Congress has clearly denied to local governments. Instead, the Commission should follow the Act's explicit instructions by promulgating regulations that expedite deployment of OVS with limited local government involvement.

1. The FCC should not be distracted by baseless claims that Congress' passage of the 1996 Act constitutes a Fifth Amendment taking.

In raising its unsupportable claim that deployment of OVS would result in an unconstitutional taking, the League is simply attempting to distract the Commission from the purpose of the proceeding. As the League conceded in its comments, Congress has the power to take private property for public use in exchange for just compensation. It has no less power to require that state or local rights-of-way accommodate intrastate commerce or federal uses. Accordingly, Congress is within its realm to pass a law instructing the FCC to authorize OVS operators to use public rights-of-way in exchange for a compensatory fee in lieu of a franchise fee.[75] Since Congress has already considered and decided this issue, the Commission may not second-guess

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[74] Id. at 56-63.

[75] See 1996 Act § 653(c)(2)(B).

Congress, much less defy the specific intent of Congress by effectively granting local governments a veto over OVS.

By its express terms, the 1996 Act exempts OVS operators from the requirement of obtaining a franchise[76] and instructs the Commission to set regulations for the payment to cities of a fee in lieu of a franchise fee.[77] At no point does the Act give local governments the right to veto the deployment of OVS systems, a right that would be effectively indistinguishable from a franchise obligation. Instead, the Act limits local governments to a managerial role over rights-of-way, a role that must be carried out in a nondiscriminatory and competitively neutral manner in exchange for a fair and reasonable fee.[78] Additionally, the Act gives the FCC an express right to "preempt" local regulations that exceed a purely managerial function.[79] Taken together, these provisions provide express instruction for the FCC's certification of OVS systems using public rights-of-way in exchange for a just fee. The Commission should not eviscerate these provisions by allowing local governments to wield a type of franchise power in the guise of managing rights-of-way.

The Commission should also refrain from placing other obstacles in the path of rapid certification of OVS systems. Specifically, nothing in the Act suggests that local right-of-way authority is a prerequisite to filing or approval of

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[76] See 1996 Act § 653(c)(1)(C).

[77] See 1996 Act § 653(c)(2)(B). Note, that the Act states that OVS operators "may" be required to pay a fee in lieu of a franchise fee, indicating that local governments have the option of declining the receipt of a fee.

[78] See 1996 Act § 253(c).

[79] See 1996 Act § 253(d).

OVS certifications, and the League cites no authority for its contrary assertion that OVS certifications "must include incontestable evidence of specific [right-of-way] authorization. . . in the form of . . . licenses or franchises."[80] Indeed, the clear intent of the Act belies any such assertion. Moreover, the timeframe established by the Act clearly evinces Congress' intent to enable the quick introduction of OVS service rather than an intent to allow municipalities to burden the certification process with unnecessary, extra-statutory requirements.[81]

2. The League is incorrect in claiming the Fifth Amendment gives property owners a right to deny consent to the public use of private property.

As discussed above, the League's claim that the 1996 Act violates the Fifth Amendment takings clause is little more than a smoke screen designed to divert the Commission from the Act's explicit instructions that OVS should be rapidly authorized with minimal regulatory burdens. The Commission should note, however, that the League's takings arguments misconstrue applicable law and should be rejected.

Most of the League's "takings" arguments are based on the incorrect assumption that the Fifth Amendment gives local governments a right to "grant or deny consent" to the use of its rights-of-way.[82] In fact, the protection provided

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[80] League of Cities at 70.

[81] See, e.g., 1996 Act § 653(a) (Commission must approve applications in 10 days) and § 653(b) (must draft rules within 6 months).

[82] See League of Cities at 56.

by the Fifth Amendment consists solely of a guarantee of "just compensation" whenever the federal government takes **private** property for public use. It has never been construed to permit property owners to "deny consent" to the taking of property by the federal government for public use. In this regard, the League is incorrect in asserting that the U.S. Supreme Court held in *Loretto v. TelePrompter Manhattan CATV Corp.* that "an apartment building owner has the right to *grant or deny consent* to a telecommunications company that wishes to run cables through or on its building."[83] Instead, *Loretto* affirmed a private property owner's right to "just compensation" -- but only for a compelled physical invasion of its property.[84] Applying the holding in *Loretto* to OVS and assuming for argument's sake that the Fifth Amendment's takings clause applies to public rights-of-way,[85] they are not entitled to deny consent to the rapid deployment of OVS.

In reality, many local telephone companies already have right-of-way authority, whether by state statutory fiat or negotiated franchise agreements with communities. The introduction of new services -- such as OVS -- does not alter this authority. Indeed, the League has cited no law to suggest that existing right-

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[83] Id. (citing *Loretto*, 458 U.S. 419 (1982)) (emphasis added).

[84] Loretto, 458 U.S. 419. On remand the New York State Commission on Cable Television was directed to calculate a "just compensation" for allowing wires to be installed on rental property. The Commission concluded that one dollar per building was appropriate since the installation of cable service actually enhanced the value of property. See One Dollar Cable Fee For TV Hookup Upheld By State, N.Y. Times, May 9, 1983, at B3.

[85] The right of governmental entities to assert rights to compensation pursuant to the takings clause is far from clear. League of Cities cites *City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1892) in support of this proposition, but that case never cites the Fifth Amendment in ruling a city has a right to charge a utility for use of its public rights-of-way.

of-way authority is somehow obviated by new service introduction; nor does the 1996 Act provide for such a result.

3. The League's argument that the FCC lacks authority to authorize OVS to use rights-of-way ignores Congress' explicit instructions in the 1996 Act.

While the League of Cities makes several other takings-related arguments in its comments, they are irrelevant to this proceeding. First, the League incorrectly claims that the issue of appropriate compensation is irrelevant to the threshold question of whether a taking has occurred.[86] The League cites *Ramirez de Arellano v. Weinberger* for this proposition, but that case simply reaffirms the requirement that a government agency must have *statutory* authority to take **private** property, regardless of whether compensation is offered.[87] In this case, as discussed previously, the statutory authority for the FCC's certification of OVS is explicit in the 1996 Act. Accordingly, the holding in *Ramirez de Arellano* is irrelevant.

The League similarly argues that the Commission cannot authorize OVS operators to use rights-of-way because such authorization would necessitate the power of eminent domain, a power that must derive from Congress either through express statutory terms or by necessary implication.[88] As discussed above, however, by its express terms, the 1996 Act exempts OVS operators from

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[86] See League of Cities at 56-57.

[87] See Ramirez de Arellano, 745 F.2d 1500 (1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985).

[88] See League of Cities at 61.

a franchise requirement,[89] limits local governments to a managerial role over rights-of-way,[90] and instructs the FCC to "preempt" local regulations that exceed a purely managerial function.[91] Taken together, these provisions provide express authority for FCC certification of OVS systems using public rights-of-way in exchange for compensation.

Even if express authority did not exist in the Act, the statutory authority for FCC certification of OVS systems is evident through necessary implication. The Act's direction that OVS operators be permitted to deploy systems in a nondiscriminatory and competitively neutral manner necessitates rules that deny local governments a veto power over OVS deployment. Substantial evidence exists that allowing local governments to have a veto power over OVS would result in substantial delay and unintended pre-conditions that could result in the abandonment of planned OVS systems in many communities.[92] Such a result would be directly contrary to the clear intent of the 1996 Act. Accordingly, in order to carry out the direction of Congress, the Commission necessarily must refuse to place a veto power in the hands of local governments.[93]

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[89] See 1996 Act § 653(c)(1)(C); 47 USC § 653(c)(1)(C).

[90] See 1996 Act § 253(c); 47 U.S.C. § 253(c).

[91] See 1996 Act § 253(d); 47 U.S.C. § 253(d).

[92] See e.g., Frank W. Lloyd & Cameron F. Kerry, Franchise Fees Enforcement Under The Cable Act: An FCC Responsibility, 39 Fed. Comm. L.J. 53, 62 (1987) (noting problems of municipal abuse of the franchising process previous to 1984 Cable Act that could frustrate the expansion and diversification of cable television).

[93] Because the 1996 Act leaves the FCC no alternative but to authorize OVS operators to use rights-of-way in exchange for a fee, the holding in Bell Atlantic v. FCC is not applicable. See 24 F.3d 1441 (D.C. Cir. 1994). In Bell Atlantic, the D.C. Circuit declined to construe section 201(a) of the Communications Act as authorizing the FCC to order physical collocation of Competitive Access Provider equipment in LEC facilities when the option of virtual collocation would achieve the same ends without a physical invasion of a LEC's property. Id. at 1445-46. In this case, the FCC does not

The League of Cities also argues that because Congress did not explicitly authorize a taking in the 1996 Act, the Act must be construed as to not require a taking.[94] As shown above, however, Congress was explicit in its instructions regarding the Commission's authority to certify OVS, and the most appropriate construction of the Act provides a mechanism for compensation. Accordingly, the cases cited by the League are irrelevant since each case dealt with a statute that could be construed as authorizing the public use of private property without providing for compensation.[95] Finally, the League is misplaced in arguing that the FCC's implementation of the 1996 Act would expose the federal government to unauthorized fiscal liability.[96] Since the 1996 Act expressly contemplates the provision of appropriate fees to cities by OVS operators, no fiscal liability would be created for the federal government.

E. Joint Marketing And Bundling

Several parties propose restrictions on OVS operators' ability to bundle and market video programming jointly with telecommunications services.[97] There is no authority in the 1996 Act for this position. Indeed, the Conference

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have the option of granting local governments a veto power over OVS deployment since such a grant would be indistinguishable from the franchise requirement that the 1996 Act expressly prohibited for OVS.

[94] See League of Cities at 58.

[95] See Cable Holdings of Georgia v. McNeil Real Estate Fund, 953 F.2d 600 (11th Cir.), cert. denied, 506 U.S. 862 (1992) (considering whether Cable Communications Policy Act of 1984 permitted cable operators to install wires in private easements in common areas of condominium complexes with a provision for compensation); Media General Cable of Fairfax v. Sequoyah Condominium, 991 F.2d 1169 (4th Cir. 1993) (same).

[96] See League of Cities at 62.

[97] See e.g., Rainbow at 23-24; CCTA at 17-19; Time Warner at 17-18; Cox at 9; TCI at 9-11; Comcast at 9; AT&T at 4.

Report expresses a congressional intent to allow OVS operators "to tailor services to meet the unique competitive and consumer needs of individual markets."[98]

These commenters rely on Section 653(b)(1)(E), which simply "prohibit[s] an operator of an open video system from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming." This provision contains no reference to joint marketing or bundling and should be applied only to information provided over open video systems, not via other means. Moreover, because the Act specifically restricts joint marketing in the context of long distance services,[99] it is obvious that Congress was well aware of the issue and chose not to impose joint marketing restrictions on video programming services.

The Commission must therefore reject the commenters' calls for limitations on inbound and outbound joint marketing.[100] There is no statutory basis for the Commission to prohibit LECs from jointly marketing video and telephony services or to preclude joint marketing until cable companies provide telephony and engage in their own outbound marketing.[101] Likewise, there is no authority in the 1996 Act to forbid outbound marketing by LECs until they satisfy

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[98] Conference Report at 177.

[99] 1996 Act, §§ 271(e)(1) and 272(g).

[100] See e.g., Rainbow at 23-24; CCTA at 17-19; Continental at 15.

[101] Id.

the requirements of Sections 251-252 of the 1996 Act.[102] Proposals to restrict OVS operators from making marketing calls that compare their program offerings to those provided by the competing cable company[103] are not only absurd, but may violate the First Amendment.

Even more absurd are proposals to prohibit OVS operators from informing subscribers of their own programming services unless they also provide information about the competing cable company,[104] to require pre-certification filings of joint marketing plans,[105] and to compel OVS operators to give their subscriber lists to all other programming providers on the OVS.[106] Adopting these proposals not only would defeat the congressional objective of increasing competition in the video marketplace, but also would help ensure the swift and untimely death of OVS.

Even NCTA concedes that joint marketing and bundling of services facilitate convenient one-stop shopping and states that "there should be no prohibition against the institution of marketing inducements to encourage consumers to purchase bundled packages of services."[107] In the next breath, however, NCTA makes the unsubstantiated assertion that new residents in a community usually call the telephone company first and uses this assertion to

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[102] Cox at 9; Comcast at 9; see also CCTA at 18.

[103] Rainbow at 24; CCTA at 19; TCI at 10.

[104] NCTA at 25; TCI at 9.

[105] NCTA at 38-39.

[106] ABC at 15; Cox at 9.

[107] NCTA at 24. See also MFS at 28 [Section 653(b)(1)(E) relates only to situations in which the open video system operator is the only entity that deals directly with subscribers].

conclude that LECs offering OVS should not be allowed to market video services to such customers.[108] NCTA's claim ignores the many sources of information routinely made available to new residents regarding the service providers in communities, including cable companies, and is fundamentally at odds with Congress' intent that telephone companies be allowed to introduce competition into the video marketplace.[109]

OVS operators should be given discretion, within the OVS non-discrimination framework, to market video and telephony services jointly and to bundle or package such services for customers. There is no basis for any greater restriction on such practices than those which apply under existing antitrust laws.

F. Equipment Compatibility

Although Congress specifically exempted OVS from the Cable Act's equipment compatibility standards, some parties ask the Commission to promulgate rules regarding compatibility OVS and consumer electronic equipment.[110] As HBO correctly points out, however,

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[108] NCTA at 24-25.

[109] See Conference Report at 178. In a related argument, the Electronic Industries Association ("EIA") states that "the Commission should prohibit OVS operators from bundling OVS service with CPE," EIA at 10, citing 1996 Act, § 304; see also Tandy Corp. at 5. This rulemaking is not the appropriate place to resolve issues under Section 304. Moreover, even EIA concedes that Section 304 may not be directly applicable to OVS operators. EIA at 12 ("Even if Section 304 is not directly applicable to OVS operators . . . ."). Finally, EIA later concedes that Section 304 does not prohibit all bundling of CPE and video services: "Multichannel video programming operators may sell or lease CPE to subscribers, provided that the 'operator's charges to consumers for such . . . equipment are separately stated and nonsubsidized by charges for . . . service' provided by the network operator." EIA at 14 n.34.

[110] See e.g., ABC at 14 and *n.*27 (urging Commission to require OVS operators to design technology in a certain way); NAB at 6-7 (proposing that the Commission adopt specific transport stream and compression standards and rules regarding interference problems hypothetically

> various industry standard-setting bodies are establishing standards to facilitate compatibility and access to broadband services. In short, market forces are working appropriately and should be left undisturbed by government intervention.[111]

The Commission should leave such standards-setting activities to the market-place and refrain from stifling innovation by dictating particular approaches to technology. As one commenter aptly put it,

> there are major technological changes coming in the architecture of broadband communications networks provided by cable TV companies and common carriers. These developments could be stifled by regulatory policies that deprive network operators of the flexibility to deploy network components in a manner that is technically and economically efficient. The Congressional policy set forth with respect to Open Video Systems is consistent with a Congressional purpose to permit the development of new and innovative services and technologies with minimal regulatory intervention.[112]

III. CONCLUSION

The Joint Parties respectfully urge the Commission to adopt OVS rules that invoke the language of Section 653 without elaboration and establish a streamlined certification process. Enforcement of the obligations imposed on OVS operators, including the nondiscrimination and PEG requirements, should be left to the dispute resolution process where the Commission can address real operational issues on the basis of facts, not hypothesis. Any other approach will assure for OVS the same fate as VDT.

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posed by set top boxes); Tandy at 6 (asking Commission to apply equipment compatibility regulation to OVS). Tandy ignores the exemption of OVS from Section 624A. See §653(c)(1)(C).

[111] HBO at 8.

[112] General Instrument at 2.

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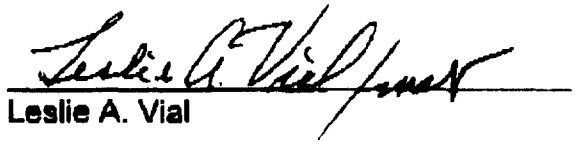

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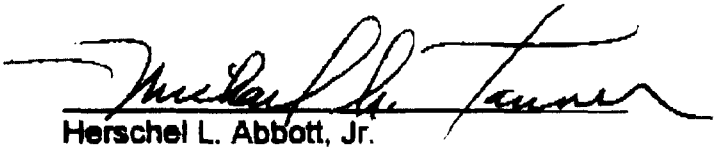

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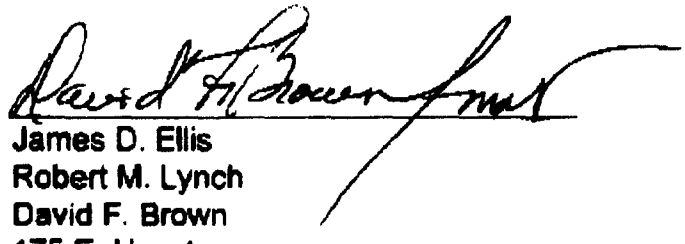

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I, Bonnie Carpenter, hereby certify that on this 11th day of April, 1996, I caused the foregoing ***Reply Comments*** to be served by first-class mail, postage prepaid, to the parties listed on the attached service list.

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